STATE OF MICHIGAN
IN THE SUPREME COURT

IN RE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2005 PA 71.
/

Supreme Court No. 130589

BRIEF OF ATTORNEY GENERAL IN SUPPORT OF CONSTITUTIONALITY OF 2005 PA 71

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Constitutional Provisions

Other Authorities

QUESTION PRESENTED FOR REVIEW

By order dated April 26, 2006, granting the request by the House of Representatives for an advisory opinion, the question before the Court is:

> **Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?**

INTRODUCTION

This Court granted the request by the House of Representatives for an advisory opinion regarding the constitutionality of the photo identification requirements contained in section 523 of 2005 PA 71, MCL 168.523, and requested that the Attorney General submit separate briefs arguing both for and against the constitutionality of these requirements.[1] This brief presents the Attorney General's argument in favor of the constitutionality of the photo identification requirements. This brief will argue that the identification requirements set forth in section 523 represent reasonable time, place, and manner restrictions that enhance the integrity of the electoral process and pass constitutional muster under both the United States and Michigan Constitutions.

STATEMENT OF FACTS

Because the matter before the Court arises under Const 1963, art 3, § 8, and because the question presented calls for consideration of the constitutionality of MCL 168.523 on its face, there is no "record" for this Court to review. A number of established procedural and historical facts nevertheless form the framework for analyzing the question before the Court, and are recounted in this Statement of Facts.

Section 523 of the Michigan Election Law, MCL 168.1 *et seq*, was one of a number of amendments originally enacted by the Legislature in 1996 PA 583, in an effort to improve the administration of elections and protect the integrity of the electoral process.[2] Before this act and section 523 became effective, however, then Attorney General Frank J. Kelley released an opinion concluding that the photo identification requirement in section 523 violated the Equal

[1] See *In re Request for an Advisory Opinion regarding Constitutionality of 2005 PA 71*, 474 Mich 1230; 712 NW2d 450 (2006). See also House Resolution 199, adopted February 22, 2006.
[2] See House Legislative Analysis, HB 5420, January 29, 1997.

Protection Clause of the Fourteenth Amendment to the United States Constitution.[3] As a result of that opinion, the Secretary of State's office has never enforced the identification requirement in any election. (See Letter from Secretary of State Terri Lynn Land, April 20, 2006, attached as Appendix A.)[4]

Between 1996 and the Legislature's reenactment of section 523 in 2005, a number of significant developments occurred in the area of election reform, and voter identification in particular, that again sparked an interest in requiring the production of picture identification at the polls. For example, the 2000 national election brought to light serious problems nationwide with our electoral system, including, among other things, flawed voter registration lists. (See Excerpts of *Building Confidence in US Elections: Report of the Commission on Federal Election Reform*, September 19, 2005, p 1, attached as Appendix B) (referred to in this brief as the "Carter-Baker Commission on Federal Election Reform.")[5] These problems led to passage of the federal Help America Vote Act of 2002 (HAVA).[6] This act sets forth comprehensive requirements to establish minimum election administration standards for States and local units of government. One of the requirements established by HAVA and imposed upon the States is an identification requirement for first-time voters who register by mail, which requires presentation

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[3] See OAG, 1997-1998, No 6930, p 1 (January 29, 1997) (referred to in this brief as OAG No 6930).

[4] In this letter, the Secretary of State asked Attorney General Cox to revisit OAG No 6930. See, MCL 14.32 (authorizing State officers to submit opinion requests to the Attorney General). The request became moot, however, when this Court granted the House of Representatives' request for an advisory opinion.

[5]The report by the Carter-Baker Commission, a bipartisan body, is also available at http://www.american.edu/ia/cfer/report/full_report.pdf. See also, the August, 2001 report issued by the National Commission on Election Reform, commonly referred to as the Ford-Carter Commission, entitled "To Assure Pride and Confidence in the Electoral Process," available at http://www.tcf.org/Publications/ElectionReform/99_full_report.pdf.

[6] See 42 USC 15301-15545.

of photographic identification or alternative documentation.[7] HAVA expressly authorizes States to establish consistent "administration requirements that are more strict" than the federal provisions.[8] Michigan adopted the HAVA requirement in 2004.[9] Twenty-two States now require some form of identification of all voters at the polls and seven of those specifically request photographic identification.[10]

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[7] See 42 USC 15483(b)(2); 42 USC 15484.
[8] See 42 USC 15483(b)(2); 42 USC 15484.
[9] See 2004 PA 92; MCL 168.509t. See also, MCL 168.813 providing that:

> A provisional ballot shall only be tabulated if a valid voter registration record for the elector is located or *if the identity* and residence *of the elector is established using a Michigan operator's license, chauffeur's license, personal identification card, other government issued photo identification card, or a photo identification card* issued by an institution of higher education in this state . . . or a junior college or community college . . . along with a document to establish the voter's current residence address as provided in section 523a(5). [Emphasis added.]

[10] See Nat'l Conference of State Legislatures, State Requirements for Voter ID, http://www.ncsl.org/programs/legman/elect/taskfc/VoterIDReq.htm. The States requiring photographic identification at the polls are Florida (Fla Stat § 101.043), Georgia (OCGA § 21-2-417), Hawaii (HRS § 11-136), Indiana (Ind Code § 3-11-8-25.1), Louisiana (La RS 18:1309), South Carolina (SC Code Ann § 7-13-710), and South Dakota (S.D. Codified Laws § 12-18-6.1). Three of these States – Florida, Louisiana, and Georgia – are required to submit proposed changes in their States' election laws to the United States Department of Justice for approval under the federal Voting Rights Act of 1965, 42 USC 1971 *et seq*, and all three have obtained that approval for their photo identification requirements. (See, *e.g.*, Letter from Assistant Attorney General William E. Moschella, United States Dept of Justice, to the Honorable Christopher S. Bond, United States Senate, dated October 7, 2005, explaining the factors considered by the Justice Department in reaching its decision to pre-clear Georgia's voter identification requirements, available at http://www.justice.gov/crt/voting/misc/ga_id_bond_ltr.htm.)

This approval process is commonly known as seeking "pre-clearance" and it applies to any State or political subdivision determined to be a "covered jurisdiction." A covered jurisdiction must demonstrate that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color," [or membership in a "language minority."] 42 USC 1973c and 42 USC 1973b(f)(2). Michigan has two covered jurisdictions due to the presence of the requisite number of citizens of a language minority – Buena Vista Township in Saginaw County and Clyde Township in Allegan County.

The findings and recommendations of the Carter-Baker Commission on Federal Election Reform were also released in this interim period. (See Appendix B). This 21-member bipartisan commission, chaired by former President Jimmy Carter and former United States Secretary of State James A. Baker III, was established in conjunction with American University's Center for Democracy and Election Management and a number of other organizations to prepare proposals for election reform. Aiming both to increase voter participation and to assure the integrity of the electoral system, the Commission offered five "pillars" on which these goals could be achieved. Among these was a recommendation favoring voter identification to enhance ballot integrity. Given the millions of people who move each year in the United States and the numbers living in urban areas unlikely to even know each other, the Commission concluded that "some form of identification is needed" to assure that the person arriving at the polling place is the same one named on the registration list. (Appendix B, p 18.) While the Commission was divided on the magnitude of voter fraud generally present in the country, it did not doubt that it occurred, and agreed that the magnitude was less a problem than the role it played in close elections and the way even the perception of possible fraud contributed to low confidence in the system. (Appendix B, p 18.) According to the Commission, "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important." (Appendix B, p 18.) The Commission further observed that "[v]oters in nearly 100 democracies use a photo identification card without fear of infringement on their rights." (Appendix B, p 5.)

Also during this interim period, the Michigan Attorney General addressed instances of election fraud. For example, Attorney General Cox filed felony charges against three Ecorse City Council members and another individual relating to the improper handling of absentee voter

ballots in 2003. (See Appendix C, January 7, 2003, Press Release and Jason Alley, *Council members lose election, court battle*, The News-Herald (January 11, 2004).) Similar charges were brought against a River Rouge resident in 2004. (See Appendix C, Press Release, February 24, 2004, and Jason Alley, *Contractor indicted on fraud*, The News-Herald (February 29, 2004).) In the 2004 election year, the Bureau of Elections received, investigated, and substantiated reports of fraudulent voter registrations from Wayne, Oakland, Ingham, and Eaton Counties. (Appendix A; See also Appendix C, Dawson Bell, *Campaign workers suspected of fraud*, Detroit Free Press, (September 23, 2004) and Election News, Issue 137, September 21, 2004.) In 2005, the potential for fraud or other irregularities was highlighted during the election in the City of Detroit, which took place amidst lawsuits and investigations regarding the City's voter lists and absentee ballot practices. (Appendix C, David Josar, Lisa Collins and Brad Heath, *Absentee ballots tainted?*, Detroit News, (October 30, 2005); David Josar, Lisa Collins, *State targets Detroit ballots*, Detroit News, (November 1, 2005); Kathleen Gray, John Bebow, and Ben Schmitt, *Detroit's flawed registry*, Detroit Free Press, (November 3, 2005).)[11] In addition, recent media accounts for 2006 profile growing concerns regarding the integrity of Michigan's elections based in part on alleged troubles with voter registration lists. (Appendix C, Geoff Dougherty, *Dead voters on rolls, other glitches found in 6 key states*, Chicago Tribune (Zone C, p 13).)[12]

In this context, with a few minor changes not relevant to the question before the Court, the Legislature reenacted and the Governor signed into law section 523 and its identification requirements in 2005 PA 71.[13] As reenacted, section 523 provides, in pertinent part[14]:

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[11] See also, *Williams v Kelly*, 2006 US Dist LEXIS 8668 (ED Mich 2006).
[12] For additional articles, see Appendix C (Lisa M. Collins, *In Mich., even dead vote*, Detroit News, (February 26, 2006); Lisa M. Collins, *Feds demand Michigan voter roll cleanup*, Detroit News, (February 28, 2006)).
[13] Section 523 becomes effective January 1, 2007.
[14] MCL 168.523(1).

> (1) At each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual . . . , an operator's or chauffeur's license issued to that individual . . . , or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official. . . . If the elector does not have an official state identification card, operator's or chauffeur's license as required in this subsection, or other generally recognized picture identification card, the individual shall sign an affidavit to that effect before an election inspector and be allowed to vote as otherwise provided in this act. However, an elector being allowed to vote without the identification required under this subsection is subject to challenge as provided in section 727.

Section 523 thus requires a person offering to vote to produce some form of generally recognized picture identification. If the voter is unable to do so, the voter may cast a regular ballot after signing an affidavit, although like any other ballot, it will be subject to challenge under MCL 168.727.

Given the shadow cast over the initial enactment of section 523 by OAG No 6930, the House of Representatives approved a resolution asking this Court to issue an advisory opinion regarding the constitutionality of the reenacted identification requirement pursuant to Const 1963, art 3, § 8.[15] This Court granted the request on April 26, 2006, identifying the "question submitted [as]: Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?" The arguments set forth below will demonstrate that the photo identification requirements in section 523 are constitutional under both the Michigan and federal constitutions. The identification requirements represent a constitutional exercise of legislative power to enact reasonable time, place, and manner restrictions that preserve and enhance ballot integrity and guard against abuses of the electoral process in Michigan. This Court should therefore uphold

[15] See 2006 Journal of the House 276 (No 17, February 21, 2006) for the text of the resolution.

the constitutionality of section 523 and clear the path for its enforcement by the Secretary of State in Michigan's elections.

STANDARD OF REVIEW

Because this is an original proceeding, this Court's review of the issues presented is de novo. The Court's Order granting the request for the advisory opinion indicates that the Court will conduct a facial review of the constitutionality of section 523.

SUMMARY OF THE ARGUMENT

The Legislature is authorized under both the Michigan and United States Constitutions to implement reasonable time, place, and manner restrictions regarding the electoral process.[16] The photo identification requirements set forth in section 523 represent reasonable time, place, and manner restrictions on the act of voting that enhance the purity of Michigan's elections and preserve the integrity of the electoral process by protecting against fraud and enhancing voter confidence. Because the identification requirement and the alternative affidavit provision impose only minimal burdens upon an elector and advance important state interests, section 523 does not violate the Equal Protection Clauses of the State or federal constitutions under established United States Supreme Court precedent. With respect to the Michigan Constitution, as a constitutionally authorized time, place, and manner restriction, section 523 does not impose a new "qualification" upon electors in violation of Const 1963, art 2, § 1, which sets forth the basic requirements for becoming an elector and eligible to vote. Similarly, the photo identification requirement does not violate the "purity of elections" clause set forth in Const 1963, art 2, § 4, which mandates that the Legislature enact laws to protect the electoral process, because the requirement applies fairly and evenhandedly to all electors. Finally, under both the Twenty-Fourth Amendment and the Equal Protection Clause of the United States Constitution,

[16] See Const 1963, art 2, § 4; US Const, Art I, § 4, cl 1.

States are prohibited from imposing a poll tax or making wealth a condition of voting in state and federal elections. Under the plain language of United States Supreme Court precedent, section 523 does not constitute a poll tax because it does not condition voting upon the payment of a fee. Similarly, although there may be incidental costs associated with obtaining identification, those incidental costs secure the right to obtain identification, not the right to vote, and are avoidable altogether under the affidavit alternative, and do not violate this constitutional prohibition.

ARGUMENT

I. The photo identification requirements of section 523 of 2005 PA 71, MCL 168.523, on their face, do not violate either the Michigan Constitution or the United States Constitution.

The question presented here raises four primary issues that will be addressed in this briefing. This brief will first address the constitutionality of the identification requirement under the Equal Protection Clause of the United States Constitution, the basis on which section 523 as adopted in 1996 PA 583 was determined to be unconstitutional in OAG No 6930, and under the Equal Protection Clause of the Michigan Constitution. This brief will then address the constitutionality of section 523 under two additional provisions of the Michigan Constitution, Const 1963, art 2, § 1, setting forth the qualifications for electors, and under the "purity of elections" clause, Const 1963, art 2, § 4. Finally, in anticipation of arguments likely to be presented by those opposing the constitutionality of section 523, this brief will analyze whether section 523 constitutes an unconstitutional poll tax under the Twenty-Fourth Amendment to the federal constitution, or makes wealth a qualification for voting in violation of the Equal Protection Clause.

A. The Equal Protection Clauses of the Michigan and United States Constitutions guarantee that no person shall be denied the equal protection of the laws. Section 523 requires all electors to produce a generally recognized picture identification card before being allowed to cast a ballot, but also allows electors without identification to cast a ballot after affirming that they lack the requisite identification. Because any burden imposed by section 523 is minimal and the interest of the Legislature in enhancing electoral integrity is substantial, section 523 does not violate equal protection.

Because section 523's photo identification requirements impose only a minimal burden on Michigan electors, and advance an important state interest in promoting the security and integrity of Michigan elections, the requirements do not violate the Equal Protection Clauses of the Michigan and United States Constitutions.

1. Overview of the Legislature's constitutional authority to impose reasonable restrictions on the time, place, and manner of holding elections in Michigan.

The "right to vote" is not an expressly protected constitutional right. Rather, the United States Supreme Court has explained through its decisions that there is a protected right, "implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population."[17] With respect to voting and the restrictions that may be

[17] *San Antonio Independent School District v Rodriguez*, 411 US 1, 34 n 74, 36 n 78; 93 S Ct 1278; 36 L Ed 2d 16 (1973), citing *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972), citing *Reynolds v Sims*, 377 US 533, 562; 84 S Ct 1362; 12 L Ed 2d 506 (1964); *Evans v Cornman*, 398 US 419, 421-422, 426; 90 S Ct 1752; 26 L Ed 2d 370 (1970); *Kramer v Union Free School District*, 395 US 621, 626-628; 89 S Ct 1886; 23 L Ed 2d 583 (1969); *Cipriano v City of Houma*, 395 US 701, 706; 89 S Ct 1897; 23 L Ed 2d 647 (1969); *Harper v Virginia Board of Elections*, 383 US 663, 667; 86 S Ct 1079; 16 L Ed 2d 169 (1966); *Carrington v Rash*, 380 US 89, 93-94; 85 S Ct 775; 13 L Ed 2d 675 (1965). See also *Bush v Gore*, 531 US 98, 104-105; 121 S Ct 525; 148 L Ed 2d 388 (2000) for a brief review of the "right to vote" in federal elections.

imposed on this protected right, the United States Supreme Court has made clear that fair and honest elections require regulation[18]:

> It is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. The Constitution provides that States may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives," and the Court therefore has recognized that States retain the power to regulate their own elections. Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."

Consistent with the right reserved to the States by the federal constitution and case precedent, Michigan's Constitution mandates that the Legislature[19]:

> [E]nact laws to regulate the time, place and manner of all nominations and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States. The legislature shall enact laws to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. . . .

The right to vote, and its associated rights, although entitled to a high degree of protection, are not absolute and may clearly be regulated by the State of Michigan under both the federal and state constitutions.

2. Section 523 does not violate the Equal Protection Clause of the United States Constitution.

The Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the laws.[20] The essence of the Equal Protection Clauses is that the government should not treat persons

[18] *Burdick v Takushi*, 504 US 428, 433; 112 S Ct 2059; 119 L Ed 2d 245 (1992) (internal citations omitted). The relevant provision of the United States Constitution is US Const, art I, § 4, cl 1.
[19] Const 1963, art 2, § 4.
[20] US Const, Am XIV; Const 1963, art 1, § 2.

differently because of certain innate characteristics that do not justify disparate treatment.[21] At the same time, the Equal Protection Clauses do not prohibit disparate treatment with respect to individuals on account of other more genuinely differentiating characteristics.[22] Additionally, even where the Equal Protection Clauses are implicated, the clauses do not go so far as to prohibit the State from distinguishing between persons, but rather they require that "the distinctions that are made not be arbitrary or invidious."[23]

Generally, when a plaintiff raises an equal protection challenge, the court must apply one of three traditional levels of review depending on the nature of the alleged classification. The highest level of review – "strict scrutiny" – is invoked where the law results in classifications based on "suspect" factors like race, national origin, or ethnicity.[24] Absent the implication of these highly suspect categories, an equal protection challenge requires either rational-basis review or an intermediate, "heightened scrutiny" review.[25]

Cases deciding equal protection challenges to election laws have created a body of overlapping precedent primarily applicable in the election-law context. The United States Supreme Court has issued a number of decisions developing the appropriate manner for reviewing such challenges to election laws, whether those challenges are based on equal

[21] *Miller v Johnson*, 515 US 900, 919; 115 S Ct 2475; 132 L Ed 2d 762 (1995); *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000).
[22] *Puget Sound Power & Light Co v City of Seattle*, 291 US 619; 54 S Ct 542; 78 L Ed 1025 (1934).
[23] *Avery v Midland Co, Texas*, 390 US 474, 484; 88 S Ct 1114; 20 L Ed 2d 45 (1968); *Crego*, 463 Mich at 259.
[24] *Plyler v Doe*, 457 US 202, 216-217; 102 S Ct 2382; 72 L Ed 2d 786 (1982).
[25] *Crego*, 463 Mich at 259.

protection principles or on First Amendment rights such as freedom of association, and has further clarified the applicable standard in the last several years.[26]

In *Anderson v Celebrezze*, the United States Supreme Court addressed the constitutionality of an Ohio statute that required an independent candidate for President to file a statement of candidacy and nominating petition in March, nearly eight months before the general election in November in order to appear on the ballot.[27] A candidate who was denied access to the ballot because of the time deadline and his supporters filed suit challenging the constitutionality of the statute under the First and Fourteenth Amendments. The United States Court of Appeals for the Sixth Circuit upheld the deadline. The Supreme Court reversed.

The Court began its analysis by noting that although the direct impact of the filing deadline fell on candidates, it was essential that the Court examine the statute in "a realistic light" and the "extent and nature" of its impact on voters.[28] The Court observed that the right to vote is "'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'"[29] The exclusion of candidates also burdens voters' freedom of association, "because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."[30] The Court recognized, however, that although these rights "are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates," and that "'as a practical matter, there must be a substantial regulation of

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[26] See, e.g., *Anderson v Celebreeze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983); *Burdick*, 504 US 428; *Timmons v Twin Cities Area New Party*, 520 US 351; 117 S Ct 1364; 117 S Ct 1364 (1997); *Clingman v Beaver*, 544 US 581; 125 S Ct 2029; 161 L Ed 2d 920 (2005).
[27] *Anderson*, 460 US at 780-786.
[28] *Anderson*, 460 US at 786-787 (internal citation omitted).
[29] *Anderson*, 460 US at 787 (internal citations omitted).
[30] *Anderson*, 460 US at 787-788 (internal citation omitted).

elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"[31] The *Anderson* Court observed that these regulations, whether they govern "the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affect[ ] . . . the individual's right to vote and his right to associate with others for political ends. Nevertheless, *the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions*."[32]

After establishing these background principles, the Court noted that constitutional challenges to election laws "cannot be resolved by any 'litmuspaper test' that will separate valid from invalid restrictions"[33]:

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. *It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule*. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made."

Using this approach, the *Anderson* Court concluded that the burden imposed on the associational rights of independent voters and candidates by the Ohio regulation was substantial and unequal, and because the regulation affected the office of President, implicated a uniquely important national interest.[34] A majority of the Court determined that none of the important interests

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[31] *Anderson*, 460 US at 788, quoting *Storer v Brown*, 415 US 724, 730; 94 S Ct 1274; 39 L Ed 2d 714 (1974).
[32] *Anderson*, 460 US at 788 (emphasis added).
[33] *Anderson*, 460 US at 789-790 (internal citations omitted; emphasis added).
[34] *Anderson*, 460 US at 790-795.

asserted by Ohio – voter education, equal treatment for partisan and independent candidates, and political stability – justified the deadline, and reversed the decision of the Court of Appeals.[35]

The Court further refined the applicable standard of review in elections cases in *Burdick v Takushi*, an equal protection challenge to Hawaii's ban on write-in voting.[36] There, the Supreme Court began its legal discussion by observing that the petitioner had erroneously assumed that "a law that imposes any burden upon the right to vote must be subject to strict scrutiny."[37] Noting that the Court's cases "do not so hold," the Court pointed out that election laws will invariably impose some burden upon a voter's right to vote and his right to associate with others, but that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[38] Quoting from its decision in *Anderson*, the *Burdick* Court stated that "a more flexible standard applies"[39]:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

The Court continued that under that standard the "rigorousness" of the inquiry into the validity of a state election law will depend upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights[40]:

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[35] *Anderson*, 460 US at 795-806. Justice Rehnquist filed a dissenting opinion, in which Justices White, Powell, and O'Connor joined, concluding that Ohio's law was rational and allowed nonparty candidates reasonable access to the ballot. *Anderson*, 460 US at 806-823 (Rehnquist, J, dissenting.)
[36] *Burdick*, 504 US at 428.
[37] *Burdick*, 504 US at 432.
[38] *Burdick*, 504 US at 433.
[39] *Burdick*, 504 US at 434, quoting *Anderson*, 460 US at 789.
[40] *Burdick*, 504 US at 434 (internal citations omitted; emphasis added).

> [A]s we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.*

This restatement of the applicable standard was applied by the Supreme Court in *Timmons v Twin Cities Area New Party*, in which the Court upheld against a First Amendment challenge a Minnesota statute that prohibited candidates from appearing on the ballot as the candidate of more than one party.[41] In 2005, the Court again applied *Burdick's* flexible standard in *Clingman v Beaver*, a First Amendment challenge to an Oklahoma primary election statute.[42] Thus, under United States Supreme Court precedent, the level of review to be employed by a court analyzing a constitutional challenge to an election law hinges on the level of the burden imposed by the regulation on an elector's First and Fourteenth Amendment rights. A "severe" burden will require "strict scrutiny" review and the demonstration of a compelling state interest, while a lesser burden requires a lesser review.[43] Because it is the burden that determines the level of review, it is the first question that must be addressed in resolving the federal equal protection issue here.

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[41] *Timmons*, 520 US at 353-354, 358-359.

[42] *Clingman*, 544 US at 591-592, and 602-603 (Justice O'Connor, concurring in part, concurring in judgment).

[43] Election cases are often described as falling into two categories – ballot access or voting rights. A ballot access case generally involves a challenge to a restriction that impedes a candidate's or party's access to the ballot, and thereby affects the First Amendment right of freedom of association. A voting rights case generally involves a challenge to a restriction that affects an elector's right to vote – such as this case. At times, courts have seemingly distinguished between the two categories, according ballot access restrictions less rigorous review than restrictions affecting voting rights. See, e.g., *Stewart v Blackwell*, 444 F3d 843, 856-862 (CA 6, 2006). As the Supreme Court observed in *Burdick*, however, this is essentially a distinction without a difference since the rights of voters and the rights of candidates will often overlap and "do not lend themselves to neat separation." *Burdick*, 504 US at 438, quoting *Bullock v Carter*, 405 US 134, 143; 92 S Ct 849; 31 L Ed 2d 92 (1972). Thus, ballot access cases and voting rights cases should be subject to the same flexible approach described in *Burdick*.

Before examining that burden, however, it is important to note that whenever called upon to review a law of this State, the courts must follow the maxim that a statute duly enacted by the Legislature is entitled to a presumption of constitutionality "'unless the contrary clearly appears.'"[44] In case of doubt, "'every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation.'"[45] In addition to this presumption of constitutionality, in the area of election fraud, the courts have advised that considerable deference should be accorded to the legislative judgment because "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which [the courts] should not interfere unless strongly convinced that the legislative judgment is grossly awry."[46] As argued below, no such facial showing can be made in this case.

The identification requirements in section 523 do not impose a "severe" burden on Michigan electors' rights. Electors do not have a right to vote in any manner they see fit, and there certainly is no protected right to vote free from any identification requirement. Michigan law has long required electors to demonstrate proper residency before voting. Section 523 merely requires that electors appearing at the polls to cast a ballot produce either a state identification card, a driver's license, or some form of "generally recognized picture identification." If an elector is unable to present picture identification falling into any of those three categories, the elector can cast, and have counted, a regular ballot after signing an affidavit stating that the elector cannot produce the required identification. Thus, on its face, section 523 applies across the board to all electors, and does not deny any individual the right to vote. The

[44] *Rohan v Detroit Racing Ass'n*, 314 Mich 326, 341-342; 22 NW2d 433 (1946).
[45] *Rohan*, 314 Mich at 341-342 (citations omitted).
[46] *Griffin v Roupas*, 385 F3d 1128, 1131 (CA 7, 2004).

minimal burdens imposed include bringing or securing picture identification to produce at the polling place, or signing an affidavit if the elector does not have identification.

With respect to producing identification, a majority of Michigan's registered electors have driver's licenses or state identification cards. A 2006 report prepared by the Michigan Department of State indicates that there are 7,255,972 registered voters in Michigan.[47] An analysis of Department records indicates that there are only approximately 343,062 registered voters who do not possess a driver's license or state identification card. (See Appendix D, affidavit of Heidi Weber Reed, Director of the Bureau of Driver and Vehicle Records for the Michigan Department of State.) Thus, the vast majority of registered electors possess one of these forms of identification. These voters will therefore experience little if any burden upon imposition of the photo identification requirement.

For those without a driver's license or a state identification card, either may be obtained in any of the 153 Secretary of State branch offices situated evenly throughout the State, with at least one in each county.[48] While the fee for a driver's license is $25,[49] personal identification cards may be obtained for a reasonable $10 or for free for individuals 65 years of age or older, for those with disabilities, or for those who can demonstrate good cause.[50] Otherwise, section

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[47] See 2006 Biennial Precinct Report, available at http://www.michigan.gov/documents/2006_Biennial_Precinct_Report_156973_7.pdf. Of course, far fewer registered voters actually vote in state elections. Statistics show that in the 2004 Presidential Election, 4,875,692 electors voted out of 7,164,047 registered voters, while in the 2002 Gubernatorial Election, 3,219,864 electors voted out of 6,797,293 registered voters. See Voter Registration and Election Turnout Statistics, available at http://www.michigan.gov/sos/0,1607,7-127-1633_8722-29616--,00.html.

[48] MCL 257.205.

[49] MCL 257.811.

[50] MCL 28.292(12) and (14). It may become easier to get a free State identification card. After this Court granted the advisory opinion request, the House of Representatives introduced legislation that would amend MCL 28.292 to require the Secretary of State to provide free identification cards to individuals who present evidence that they are unable to pay the fee required. See House Legislative Analysis, HB 6007, May 2, 2006.

523 authorizes the acceptance of any "generally recognized" form of picture identification. Forms of identification that would likely qualify under a reasonable interpretation of this language would include: out-of-state driver's licenses with photo; personal identification cards from any state with photo; government-issued photo identification cards; passports; student identification cards with photo; credit or automated teller cards with photo; military identification cards with photo; and employee identification cards with photo.[51] The majority of Michigan's electors will have no trouble producing a piece of identification that falls within one of these categories. Surely this Court may take judicial notice that most persons carry some form of picture identification with them every day. We are often called upon to produce identification, whether when writing a check at the local grocery store, cashing a check at the bank, boarding a plane, or when gaining access to certain public buildings for work or recreation. Given the number of acceptable forms of identification and the relative ease in obtaining identification, section 523's requirement that electors produce identification before voting is a minimal burden at best, and certainly cannot be construed as a "severe" burden on voting rights.

With respect to those registered electors who do not possess either a driver's license, state identification card, or some other form of "generally recognized" picture identification, section 523 provides a fail-safe voting mechanism.[52] When section 523 was first passed in 1996, some

[51] These forms of identification are accepted by the Secretary of State's office as satisfying the HAVA-imposed federal identification requirement for first-time voters who register by mail. See MCL 168.509t and "Procedure for Implementing Federal Identification Requirement in Polls," available at the Secretary of State's website http://www.michigan.gov/documents/Fed_ID_Req_105890_7.pdf.

[52] The 343,062 figure of registered voters who do not possess a driver's license or personal identification card was determined solely by reviewing Department of State records. That office has no way of determining how many of those registered voters might nevertheless possess some other form of picture identification that would qualify under the "generally recognized" category. (Appendix D, ¶ 10.) There is also no way of knowing how many of the 343,062 are disadvantaged to the extent they would be unable to obtain a state identification card.

argued that its photo identification requirement would have a discriminatory effect, claiming that it imposes too severe an economic or logistical burden on the poor, those who do not drive, particularly the elderly, the handicapped, and those who do not have identification for whatever reason.[53] All of these individuals, however, are specifically permitted to vote under section 523. These electors may fill out an "affidavit" indicating that they are unable to produce the required identification.[54] They will then be allowed to cast a ballot, and have that ballot counted like that of any other voter. Although section 523 has not been enforced due to OAG No 6930 and thus no affidavit form has been developed or used, the Secretary of State's Bureau of Elections advises that any such affidavit would involve a simple form requiring the signature of the voter and a counter-signature by the election inspector. The affidavit alternative therefore operates as a universal economic leveler with respect to the minimal burden imposed by the picture identification requirement. Moreover, the affidavit alternative operates in tandem with Michigan's absentee ballot process, which permits, among others, the elderly and the handicapped to vote by absentee ballot, thus avoiding the polling place identification requirement established by section 523.[55]

Opponents of the measure may argue that section 523 is discriminatory because of its specific provision that ballots cast by electors under the affidavit alternative will be subject to

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Presumably, a percentage of these voters do possess alternative identification or have the means of obtaining identification that would satisfy section 523, thus reducing this figure.

[53] See OAG No 6930, p 3.

[54] Section 523 requires an individual lacking the requisite forms of identification to "sign an affidavit to that effect before an election inspector." MCL 168.523(1). Although it is designated as an "affidavit" in the act, the affidavit need only be affirmed and signed by the elector before an election inspector as provided in section 523; the inspector would then sign the affidavit attesting to the elector's affirmation and avoid any need for the services of a notary public. See *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 711; 620 NW2d 319 (2000).

[55] See MCL 168.758 *et seq*. With respect to absentee voter ballots, Michigan law authorizes election officials to compare the preexisting signatures of qualified and registered electors on file to the signatures provided on the absentee ballot return envelopes to ensure that the signatures match. MCL 168.766.

challenge under MCL 168.727. This argument fails, however, because this result would follow even if section 523 did not contain that language. This is true because *all* voters are subject to challenge under section 727, which provides[56]:

> (1) An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector of the precinct, or if a challenge appears in connection with the applicant's name in the registration book. A registered elector of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has good reason to suspect that individual is not a registered elector in that precinct. An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never received the absent voter ballot or to have lost or destroyed the absent voter ballot.

It is only in the case where a person's answers to questions raised by the election inspector "show that said person is not a qualified elector at that poll," that the person may ultimately be denied a ballot and vote.[57] Moreover, under subsection 727(3), a challenger "shall not make a challenge indiscriminately and without good cause," and is subject to a misdemeanor prosecution if the challenge of a registered and qualified elector is for the purpose of annoying or delaying voters.[58] Voters using the affidavit option would thus be protected from indiscriminate challenges.

Finally, in arguing against the constitutionality of section 523, opponents might speculate that people may be unwilling or refuse to sign the affidavit and thereby be denied the right to vote. This scenario appears unlikely and counterintuitive, however, if the elector is truly interested in casting a ballot and exercising his or her political right. A person seeking to vote is already required to execute an application to vote before an election official, and an individual's unreasonable refusal to sign an affidavit should not be a basis for finding section 523

[56] MCL 168.727.
[57] MCL 168.729.
[58] MCL 168.727(3).

unconstitutional.[59] Thus, in light of all of the above, the affidavit process presents a minimal burden on those voters who cannot meet the likewise minimal burden of producing picture identification.

Having established that section 523 imposes only "reasonable, nondiscriminatory restrictions," the question remaining is whether the State can demonstrate important regulatory interests that justify the restrictions.[60] Weighed against these minimal burdens are the State's substantial interests in enhancing confidence in the integrity and security of Michigan's elections and preventing voter fraud. Michigan's Constitution directs the Legislature to enact laws "to preserve the purity of elections" and "to guard against abuses of the elective franchise."[61] Section 523 is just such a law. As stated in its title, among the purposes to be served by 2005 PA 71 are "to provide for the purity of elections" and "to guard against the abuse of the elective franchise." Section 523 is designed to further these purposes by helping to assure that the person appearing at a polling place to cast a ballot in a Michigan election is the same person appearing on the registration list of eligible voters.

OAG No 6930 struck down the photo identification requirements in section 523 of 1996 PA 583 based in part on the apparent belief that they could only be justified by a showing of substantial voter fraud in Michigan.[62] Contrary to that approach, however, given the importance of the State's regulatory interests and the minimal burden imposed on the right to vote by section 523, when all its provisions are fully analyzed, Supreme Court precedent does not demand proof of a voter fraud problem in Michigan as a necessary foundation for justifying this provision. A State's election law regulation must meet the strict scrutiny test – that is, be narrowly drawn to

[59] See MCL 168.523(1), which requires that an individual execute "an application showing his or her signature or mark and address of residence in the presence of an election official."
[60] *Burdick*, 504 US at 434.
[61] Const 1963, art 2, § 4.
[62] OAG No 6930, pp 3-5.

advance a compelling state interest – only when voting rights are subjected to "severe" restrictions.[63] The identification requirements embodied in section 523, including the affidavit alternative, are simply not "severe"; they are, to the contrary, reasonable, nondiscriminatory restrictions justified by the State's important regulatory interests.[64] Thus, arguments focusing on an asserted *absence* of voter fraud in Michigan as a basis for striking down section 523 are misplaced.

Additionally, a complete analysis of the legitimate purposes to be served by the State in enacting section 523 must take into account the constitutional mandate to preserve the purity of elections and "guard against" abuses of the elective franchise.[65] These purposes urge the Legislature to take a forward-looking approach and contemplate prophylactic measures, which, if successful, will contribute to maintaining public confidence in the integrity of its elections and, ultimately, establish a record of no voter fraud in Michigan. As emphasized by the United States Supreme Court, a State is not required to produce evidence of voter fraud prior to enactment of a law such as section 523; there is no requirement of "elaborate, empirical verification of the weightiness of the State's asserted justifications."[66] Rather, "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."[67] Section 523 represents a reasonable response for preserving ballot integrity and impinges only negligibly, if at all, on the right to vote.

Indeed, the Legislature's foresight in adopting section 523 has been confirmed. As described above in the statement of facts, recent events have cast a shadow over the integrity of

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[63] *Burdick*, 504 US at 434.
[64] *Burdick*, 504 US at 434.
[65] Const 1963, art 2, § 4.
[66] *Timmons*, 520 US at 364.
[67] *Munro v Socialist Workers Party*, 479 US 189, 195-196; 107 S Ct 533; 93 L Ed 2d 499 (1986).

Michigan's elections. Citizens were charged in 2003 and 2004 with mishandling absentee voter ballots. (See Appendix C). An article appearing in the December 4, 2004, edition of the Chicago Tribune reported that Michigan was one of six states with election "glitches" in the 2004 presidential election. (Appendix C, Dougherty, *Dead voters on rolls, other glitches found in 6 key states,* Chicago Tribune (December 4, 2004, Zone C, p 13).) According to the Tribune's analysis of voter records, as many as 50,051 registered voters in Michigan were also listed in a database of Social Security Administration death claims. (Appendix C). Other news articles reported in a similar fashion.[68]

Moreover, in the 2004 election year the Bureau of Elections received, investigated, and substantiated reports of fraudulent voter registrations from Wayne, Oakland, Ingham, and Eaton Counties. (Appendix A.) Similarly, public confidence in the electoral process eroded during the 2005 election in the City of Detroit, resulting from lawsuits surrounding voting practices there. In urging the Attorney General's office to again review the legality of section 523, the Secretary of State observed that Michigan should not be forced to "wait for rampant fraud to occur . . . before taking action to protect against it," and that "without a photo identification requirement it is nearly impossible to detect in-person voter impersonation." (See Appendix A.)

Those arguing against the constitutionality of section 523 may assert that requiring proof of a voter's identity at the polls is unnecessary because Michigan does not have a demonstrated problem with *in-person* voter fraud and thus the restriction does not advance an important state interest, or that section 523 does not sufficiently advance the State's important interests in preventing fraud because it does nothing to address the types of fraud Michigan has reported, i.e. voter registration and absentee ballot fraud. While the instances identified above may not

[68] See Appendix C (Lisa M. Collins, *In Mich., even dead vote*, Detroit News, (February 26, 2006); Lisa M. Collins, *Feds demand Michigan voter roll cleanup*, Detroit News, (February 28, 2006)).

evidence in-person voter fraud – which the Secretary of State aptly observes cannot be detected absent a photo identification requirement – they demonstrate that conditions conducive to fraud exist in Michigan. This fact in and of itself is sufficient to support the imposition of the identification requirements in section 523 as a reasonable restriction designed to enhance the integrity of the electoral process.

Again, the Legislature is not required to prove the truth of reports reflecting community concern about the purity and integrity of elections, or produce "elaborate, empirical verification of the weightiness of the State's asserted justifications" before it may act.[69] As observed in the report of the Carter-Baker Commission on Federal Election Reform, even the perception of possible fraud in the voting process may contribute to a decline in confidence in the electoral system and provides an ample basis for corrective action by the Legislature. (See Appendix B, p 18.) Moreover, across the country, whether in response to increased awareness in the electronic age of the dangers associated with identity theft or otherwise, picture identification requirements are becoming more prevalent and are gaining acceptance in daily life. (See Appendix B, p 18.) Twenty-two states now impose identification requirements on all voters and the Carter-Baker Commission, after extensive investigation and study, determined that picture identification was a necessary element to enhance ballot integrity.

Moreover, the Legislature – even in the context of the right to vote –is "allowed to take reform 'one step at a time.'"[70] The Legislature is accorded wide latitude in determining what problems it wishes to address, and the manner in which to address them[71]:

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[69] *Timmons*, 520 US at 364.
[70] *McDonald v Board of Election Comm'rs of Chicago*, 394 US 802, 807; 89 S Ct 1404; 22 L Ed 2d 739 (1969), quoting *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483, 489; 75 S Ct 461; 99 L Ed 563 (1955).
[71] *Williamson*, 348 US at 489 (internal citations omitted).

> Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Here, the Legislature chose to first address the evils of in-person voter fraud, rather than the evils associated with voter registration or absentee ballot fraud. While some may disagree with this policy decision, the choice was within the Legislature's prerogative, and that choice does not constitute "invidious discrimination" in violation of the Equal Protection Clause.[72]

In addition, following the guidance provided in *Anderson*, *Burdick*, and subsequent cases, several lower courts have upheld various state voter identification provisions in recent years.[73] For instance, in *Indiana Democratic Party v Rokita*, a federal district court upheld the constitutionality of Indiana's photo identification law.[74] The Indiana statute required individuals voting in person at polling places or casting an absentee ballot in person prior to the election, to produce picture identification "issued by the United States or the state of Indiana."[75] The law required that the identification card list the name of the person and "conform[ ] to the name in the individual's voter registration record," and the card was required to have an expiration date

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[72] *Williamson*, 348 US at 489.

[73] See *Indiana Democratic Party v Rokita*, 2006 US Dist LEXIS 20321 (US Dist Ct, Ind, April 14, 2006); *League of Women Voters v Blackwell*, 340 F Supp 2d 823 (ND Ohio, 2004); *Bay County Democratic Party v Land*, 347 F Supp 2d 404 (ED Mich, 2004) (upholding the federally-imposed anti-fraud identification requirement for first-time voters who register by mail in MCL 168.509t); and *Colorado Common Cause v Davidson*, No 04-CV-7709 (US Dist Ct, Colo, October 18, 2004). But see *Common Cause/Georgia v Billups*, 406 F Supp 2d 1326 (ND Ga, 2005) (enjoining enforcement of Georgia's voter identification law on motion for preliminary injunction). Under Georgia's law, which has since been changed and again challenged, an elector was required to present one of six forms of picture identification before being allowed to vote. Unlike Michigan's statute with its affidavit provision, Georgia's law allowed those lacking the required picture identification to vote a "provisional ballot" that would only be counted if the elector's identity could be verified within a specified time after voting. OCGA § 21-2-417, quoted at *Billups*, 406 F Supp 2d at 1336.

[74] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321.

[75] Ind Code § 3-11-8-25.1.

current through the date of the election.[76] The requirement did not apply to persons casting absentee ballots by mail, or to persons residing in a state-licensed care facility.[77] If a voter did not produce the required information, the voter was allowed to sign an affidavit attesting to the voter's right to vote in the precinct and cast a provisional ballot, which could only be counted if the voter returned with proof of identification by the second Monday following the election.[78] However, the provisional ballot could be counted if the voter returned and executed an affidavit stating that he or she is indigent and unable to obtain identification without paying a fee, or that the person has a religious objection to being photographed.[79]

The plaintiffs argued that the identification requirement violated the First and Fourteenth Amendments of the US Constitution, as well as provisions of the Indiana Constitution, by placing a severe burden on the right to vote.[80] They further argued that the statutes imposed a severe burden on the right to vote of the poor, elderly, handicapped, or other disadvantaged groups because most of these individuals did not possess picture identification and the process for obtaining picture identification (at least from the State) was too onerous both logistically and economically. The court rejected these arguments, concluding that although the plaintiffs had introduced voluminous exhibits and testimony, they had not demonstrated that any actual voter would be prevented from voting because of the failure to produce identification, nor had they demonstrated that any group would be disproportionately impacted.[81] The court thus concluded that the statutes did not impose a "severe" burden on the right to vote, and that under the rationale set forth in *Burdick*, the statutes were not subject to strict scrutiny review and the State

[76] Ind Code § 3-11-8-25.1.
[77] Ind Code §§ 3-10-1-7.2(e); 3-11-8-25.1(f); 3-11-10-1.2.
[78] Ind Code §§ 3-11-8-25.1(e); 3-11-7.5-2.5(a).
[79] Ind Code §§ 3-11.7-5-1; 3-11.7-5-2.5(c).
[80] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *114-115.
[81] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *122-129.

was only required to show that the restrictions were reasonable in light of the interests the restrictions served.[82]

With respect to the reasonableness of the restrictions, the plaintiffs argued that the identification requirements were unreasonable because Indiana had no documented problem with in-person voter fraud. Rather, the trouble was with absentee ballot fraud, which the regulations did nothing to cure or prevent. The court concluded that the State had an important interest in ascertaining an individual's identity before allowing the person to vote, and in preventing voter fraud.[83] The court noted that a State need not document fraud prior to enacting a law, and that a State should be permitted to respond to potential problems proactively.[84] Moreover, even if Indiana was required to document fraud, the court determined that it had done so by citing numerous incidents of election fraud around the United States, and the results of the Carter-Baker Commission, which found fraud and multiple voting in United States elections. In addition, the court noted that both parties had agreed that Indiana's voter rolls were "significantly inflated," which increased "the opportunity for in-person voter fraud to occur."[85] Finally, the court observed that "without a photo identification requirement it is nearly impossible to detect in-person voter impersonation."[86] The court thus held that Indiana's restrictions were reasonable and justified by the State's interests, and granted summary judgment in favor of Indiana.

The opposite result was reached in *Common Cause/Georgia v Billups.*[87] There, a Georgia district court, on motion for preliminary injunction, determined that the State's photo identification requirement violated the Equal Protection Clause of the Fourteenth Amendment.

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[82] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *115-122, 130-132.
[83] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *130-131.
[84] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *133-134, citing *Timmons*, 520 US at 364; *Munro*, 479 US at 195-196.
[85] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *134.
[86] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *134.
[87] *Billups*, 406 F Supp 2d 1326.

The Georgia statute required all electors to produce some form of State-issued or Government-issued form of picture identification before being allowed to enter the polling area and cast a ballot.[88] If an elector could not do so, he or she was allowed to vote a provisional ballot upon signing an affidavit affirming that the person is the person identified on the registration list.[89] However, the provisional ballot would only be counted if the elector provided identification establishing his or her identity within 48 hours of voting.[90]

The parties in *Billups* made arguments similar to those advanced in *Indiana Democratic Party*. The plaintiffs claimed the restriction imposed a severe burden on voting for certain disadvantaged groups of citizens who did not possess the requisite identification and either could not afford the fees necessary to secure cards or could not obtain access to places to obtain cards. The defendants argued that the restrictions were not severe because they prevented no one from voting since anyone could vote an absentee ballot, or obtain a free identification card upon an affirmation of indigency.[91] The defendants maintained that the restrictions furthered important state interests in preventing voter fraud. The plaintiffs countered that there was no problem with in-person voter fraud in Georgia; rather, fraud existed in the absentee ballot process, which the regulations did not address. The Georgia court analyzed the restrictions under both a strict-scrutiny test and the more flexible balancing approach under *Burdick*, and determined that the restrictions were likely unconstitutional under both standards. The court was persuaded that the burdens imposed on voting, specifically the burden of obtaining identification cards, were too substantial, and that the options of absentee voting, or casting provisional ballots were not

[88] *Billups*, 406 F Supp 2d at 1336, citing OCGA § 21-2-417.
[89] *Billups*, 406 F Supp 2d at 1336, citing OCGA § 21-2-417.
[90] *Billups*, 406 F Supp 2d at 1336, citing OCGA § 21-2-417.
[91] *Billups*, 406 F Supp 2d at 1361.

realistic.[92] The court recognized that Georgia had an important interest in preventing voter fraud, but concluded that the restrictions were not reasonable since there was no evidence of in-person voter fraud in Georgia, whereas there was evidence of absentee ballot and voter registration fraud, which the restrictions did not address in any fashion.[93] Accordingly, the court held that the plaintiffs had established a substantial likelihood of success on the merits, and granted the preliminary injunction.

While these decisions are not binding on this Court, the cogent analysis of the facts and law provided by the district court in *Indiana Democratic Party* is persuasive, and offers this Court a sound guidepost for resolving the questions presented here. But the most notable factor about these two federal decisions is the fact that both photo identification requirements at issue are more burdensome than section 523. Under Michigan's law, a wider array of picture identification is acceptable since the law is not limited to State-issued or United States-issued identification. Additionally, neither Georgia's nor Indiana's laws provided as simple a fail-safe mechanism as Michigan does for allowing electors who cannot meet the identification requirement to vote. Section 523 provides that electors need only sign an affidavit affirming that they do not have the requisite identification. Thereafter, electors are permitted to cast and have their ballots counted unless challenges are made and proven that the electors' ballots are invalid. Georgia's and Indiana's laws placed the burden on the electors to establish that their provisional ballots should be counted by returning to election officials after the election and providing proof of identity. Thus, to the extent the Indiana district court upheld that State's more burdensome provision as constitutional, Michigan's less burdensome provision should likewise prevail. For the same reason, the Georgia decision is distinguishable and its analysis therefore of limited

[92] *Billups*, 406 F Supp 2d at 1361-1366.
[93] *Billups*, 406 F Supp 2d at 1366.

value in this case, because the court was presented with a more burdensome restriction on the right to vote than is present here.

In summary, balancing the minimal burden placed on voting rights by section 523 against the substantial regulatory interests of the State served by the provision compels the conclusion that section 523 passes constitutional muster.[94] As stated by the Court in *Burdick*, "'[no] right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'" But the right to vote "is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."[95] There is nothing unconstitutional about requiring persons to affirm their identity before being allowed to engage in an act of such fundamental importance to our democracy. This Court should therefore conclude that section 523 does not violate the Equal Protection Clause of the United States Constitution.

3. Section 523 does not violate the Equal Protection Clause of the Michigan Constitution.

This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the federal constitution,[96] that is, Michigan's "Equal Protection Clause was intended to duplicate the federal clause and to offer similar protection."[97] This does not mean, however, that this Court is bound in its understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. Rather, it means that the Court has "been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth

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[94] *Burdick*, 504 US at 434.
[95] *Burdick*, 504 US at 441 (citations omitted).
[96] See *Harvey v State*, 469 Mich 1, 6; 664 NW2d 767 (2003); *Crego v Coleman*, 463 Mich 248, 258-259; 615 NW2d 218 (2000); *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998); *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996) ("the Michigan and federal Equal Protection Clauses offer similar protection").
[97] *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992).

Amendment have accurately conveyed the meaning of Const 1963, art 1, § 2 as well."[98] This Court should again be guided by applicable federal cases in the context of analyzing the present case.

This Court last addressed an equal protection challenge to an election law in 1982, in the decision of *Socialist Workers Party v Secretary of State*.[99] There, the Socialist Workers Party brought a state and federal equal protection challenge against an election law that required new political parties to meet petition and primary vote requirements before they could achieve ballot access. Specifically, in addition to meeting a petition requirement, the legislation required a "new" political party to obtain a minimum primary vote requirement of 3/10 of 1% of the total votes cast before it could qualify for a place on the general election ballot.[100] The statutes also imposed restrictions related to voting for the new political party.[101] The plaintiffs argued that the statutes imposed both unreasonable and unnecessary restrictions on access to the general election ballot. This Court agreed, relying solely upon United States Supreme Court precedent, and concluded that the act was unconstitutional under both the state and federal Equal Protection Clauses.

This Court began its analysis observing that "[i]n determining whether a statute restricting general election ballot access violates the First and Fourteenth Amendments, 'we must examine the character of the classification in question, the importance of the individual interests at stake, and the state interests asserted in support of the classification.'"[102] The Court acknowledged that ballot access restrictions burden the fundamental rights of individuals to

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[98] *Harvey*, 469 Mich at 6 n3.
[99] *Socialist Workers Party v Secretary of State*, 412 Mich 571; 317 NW2d 1 (1982).
[100] *Socialist Workers*, 412 Mich at 580.
[101] *Socialist Workers*, 412 Mich at 580.
[102] *Socialist Workers*, 412 Mich at 587, quoting *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173, 183; 99 S Ct 983; 59 L Ed 2d 230 (1979).

associate for the advancement of political beliefs, and the right of qualified voters to cast their votes effectively. "As a result, access restrictions operate to deter membership and participation in the excluded political association. Voters, faced with statutorily limited ballot choices, may find exercise of the right to vote a Hobson's choice and not an expression of political preference, the bedrock of self-governance."[103] The Court determined that such rights had been burdened in that case[104]:

> In 1980, the Socialist Workers Party was excluded from the November ballot by operation of the primary vote requirement in 1976 PA 94. Plaintiffs Socialist Workers Party and party member Walden press their claims in the context of a denial of their right to associate. Plaintiffs Lafferty, Moore and Reed seek relief as voters denied effective expression of political preference. In an equal protection challenge to a ballot-restricting statute, *plaintiffs have the burden of demonstrating a discrimination "of some substance" before the compelling state interest test is triggered. American Party of Texas v White*, 415 US 767, 781; 94 S Ct 1296; 39 L Ed 2d 744 (1974). We conclude plaintiffs have met this burden.

Quoting the Supreme Court's decision in *Illinois State Board of Elections v Socialist Workers Party*, this Court restated the "strict scrutiny standard of review," and further observed that the regulation must also be narrowly tailored to survive such review.[105] Applying this standard, the Court weighed Michigan's "compelling interest . . . in the protection of the integrity of its election process" against the burden the regulations imposed on the plaintiffs' rights and found that the regulations were either not necessary to serve the compelling interests or were not the least restrictive means available for doing so.[106] Thus, this Court held that the regulations were unconstitutional under the federal constitution. The *Socialist Workers Party* Court did not engage in a separate analysis under the Michigan Constitution in concluding that the regulations

[103] *Socialist Workers*, 412 Mich at 588.
[104] *Socialist Workers*, 412 Mich at 589 (emphasis added).
[105] *Socialist Workers*, 412 Mich at 589-590.
[106] *Socialist Workers*, 412 Mich at 589-595.

violated Michigan's Equal Protection Clause. Rather, the Court relied on its analysis of the federal question, observing that the two clauses secure the same rights and protections.[107]

Although issued before two of the United States Supreme Court's important election cases, *Anderson* and *Burdick,* this Court's analysis in *Socialist Workers Party* is consistent with the review employed in those cases. The *Socialist Workers Party* Court observed that it must weigh the burden imposed by the regulations on the plaintiffs' rights against the interests of the State in the regulation. The Court did not automatically employ a strict scrutiny review, but rather required the plaintiffs to first demonstrate discrimination of "some substance."[108] In other words, the plaintiffs had to demonstrate a significant or "severe" burden on their rights akin to the latter analysis employed in *Burdick* and *Anderson.*[109] After finding a substantial or "severe" burden, the Court employed strict scrutiny review and determined that the regulations were unconstitutional. Given that this Court has routinely expressed that the state and federal Equal Protection Clauses are coextensive, and the fact that this Court has followed United States Supreme Court precedent and employed an analysis similar to that set forth above, this Court should find that section 523 does not violate Michigan's Equal Protection Clause for the same reasons that it does not offend the federal provision.

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[107] *Socialist Workers*, 412 Mich at 599-600 and n 21.
[108] *Cf. Wilkins v Ann Arbor City Clerk,* 385 Mich 670; 189 NW2d 423 (1971). In this equal protection challenge to an election law, this Court automatically applied a strict scrutiny review, apparently finding that any burden imposed on the right to vote required such review under federal precedent. This case, however, was decided years before *Anderson* and *Burdick.*
[109] The Michigan Court of Appeals employed a similar analysis in *McDonald v Grand Traverse County Election Commission,* 255 Mich App 674, 688-692; 662 NW2d 804 (2003).

B. Article 2, § 1 of the Michigan Constitution sets forth the only qualifications for becoming a "qualified" elector, which are citizenship, age, and residency. Section 523 requires all electors to provide proof of their identity before casting a ballot by requiring the presentation of picture identification or an affidavit attesting to their inability to do so. Section 523 does not impermissibly impose a new "qualification" for becoming a "qualified" elector in violation of Article 2, § 1.

The Michigan Constitution sets forth the qualifications for electors in Const 1963, art 2, § 1[110]:

> Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, *shall be an elector and qualified to vote in any election except as otherwise provided in this constitution*. The legislature shall define residence for voting purposes.

Under this provision, those arguing against the requirement's constitutionality may claim that section 523 violates art 2, § 1 by imposing an additional "qualification" for voting – proof of identity – that is not "otherwise provided in this constitution." This argument requires consideration of what "qualified to vote" means.

This Court has observed that "[o]ur first inquiry, when interpreting constitutional provisions, 'is to determine the text's original meaning to the ratifiers, the people, at the time of ratification.' This is accomplished by 'applying each term's plain meaning at the time of

[110] Const 1963, art 2, § 1 (emphasis added). Michigan's age requirement is supplanted by the Twenty-Sixth Amendment to the United States Constitution, which gives 18-year-olds the right to vote. With respect to "local residence," the Legislature has statutorily provided that a person must have resided in a city or township for 30 days before they can be considered a "qualified elector." See MCL 168.10.

ratification.'"[111] This rule of "common understanding" was described by Justice Cooley in this way[112]:

> "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.'"

In discerning a term's ordinary or common understanding, this Court may look to dictionary definitions relevant to the time in question.[113]

The "qualified to vote" language was added to the 1963 Constitution. Webster's Third New International Dictionary defined the word "qualified" at that time as "fitted (as by endowments or accomplishments) for a given purpose," "having complied with the specific requirements or precedent conditions (as for an office or employment)," "eligible, certified."[114] Thus, for purposes of art 2, § 1, "qualified to vote" simply means that a person meeting the basic requirements of citizenship, age, and residency is *eligible* to vote as provided for by law. The term "qualified" cannot be equated with the term "entitled."[115]

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[111] *County Road Ass'n v Governor of Michigan*, 474 Mich 11, 15; 705 NW2d 680 (2005), quoting *Wayne Co v Hathcock*, 471 Mich 445, 468-469; 684 NW2d 765 (2004). See also *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 375; 663 NW2d 436 (2003).
[112] *Hathcock*, 471 Mich at 468, quoting *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971) (emphasis in original), quoting Cooley's Constitutional Limitations 81.
[113] See *Studier v Michigan Public School Employees Retirement Bd*, 472 Mich 642, 653-654; 698 NW2d 350 (2005).
[114] Webster's Third New International Dictionary, copyright 1961, p 1858.
[115] Notably, the previous version of art 2, § 1 – Const 1909, art 3, § 1 – contained the language "entitled to vote," which was replaced with the "qualified to vote" language in the current constitution.

Persons "qualified to vote" under the constitution and parallel statutory provision, MCL 168.10, are still subject to any number of additional requirements before they are permitted to vote.[116] The Michigan Election Law, MCL 168.1 *et seq*, imposes numerous restrictions upon voting, not the least of which is the registration requirement authorized by the constitution.[117] Only a qualified elector who is also registered to vote may obtain and cast a ballot.[118] Other regulations include directing where electors will vote by requiring them to vote in the election precinct in which they reside; establishing polling locations and when polls will be open; and providing for how a voter may cast a ballot by mandating what machinery or equipment a voter will use to do so. These are just a few examples of other requirements qualified electors must meet or comply with in order to cast their ballot on election day. Section 523 thus does not create an additional "qualification" for voting in violation of the plain language of art 2, § 1. Rather, the identification requirement – like those mentioned above – is simply an additional time, place, or manner restriction on voting authorized by the Legislature's mandate to regulate elections under art 2, § 4. Persons remain qualified electors and eligible to vote regardless of whether they possess picture identification. Any other construction of the "qualified to vote" language would invite voters to challenge as an unconstitutional qualification, otherwise reasonable and appropriate restrictions on voting that they happen to disagree with or find personally inconvenient.

While this narrow interpretation of art 2, § 1 would seem consistent with common sense, an arguably broader interpretation was employed in *Michigan State UAW Community Action*

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[116] MCL 168.10 provides that "[t]he term 'qualified elector', as used in this act, shall be construed to mean any person who possesses the qualifications of an elector as prescribed in section 1 of article 2 of the state constitution and who has resided in the city or township 30 days."
[117] See Const 1963, art 2, § 4 ("the Legislature shall enact laws . . . to provide for a system of voter registration and absentee voting.").
[118] See MCL 168.492 *et seq*.

Program Council v Secretary of State.[119] In that case, the plaintiffs asserted that an election law that required the removal of registered electors' names from registration lists if they had not voted or otherwise continued their registrations within a two-year period, was unconstitutional under the federal and state Equal Protection Clauses and under art 2, § 1.[120] This Court chose only to address the art 2, § 1 question.[121] The Court observed that the regulation clearly affected the right to vote by removing otherwise qualified voters from the voter rolls[122]:

> The importance of this right can hardly be overemphasized. It is the basic protection that we have in insuring that our government will truly be representative of all of its citizens. The United States Supreme Court has held in numerous recent decisions involving the right to vote that in order that a state law prevail which impedes this fundamental constitutional right, there must be demonstrated a compelling state interest. *Williams v Rhodes*, 393 US 23; 89 S Ct 5; 21 L Ed 2d 24 (1968); *Kramer v Union Free School Dist*, 395 US 621; 89 S Ct 1886; 23 L Ed 2d 583 (1969); *Cipriano v Houma*, 395 US 701; 89 S Ct 1897; 23 L Ed 2d 647 (1969); *Evans v Cornman*, 398 US 419; 90 S Ct 1752; 26 L Ed 2d 370 (1970); and *Phoenix v Kolodziejski*, 399 US 204; 90 S Ct 1990; 26 L Ed 2d 523 (1970). Our Court has recently applied this standard in *Wilkins v Ann Arbor City Clerk*, 385 Mich 670 (1971), a case involving the voting rights of students. Thus, in order to uphold [the statute], we must determine whether there is demonstrated a compelling state interest.

The plaintiffs argued that there were a number of legitimate reasons why an otherwise qualified voter may not vote on an occasion, including illness, travel, or a conscious protest regarding candidate choice.[123] This Court weighed those arguments against the defendant's assertion that the State had compelling state interests in guarding against the abuse of the elective franchise and preventing voter fraud.[124] The Court essentially determined that although the statute might

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[119] *Michigan State UAW Community Action Program Council v Secretary of State*, 387 Mich 506; 198 NW2d 385 (1972).
[120] *Michigan State UAW*, 387 Mich at 512-513.
[121] *Michigan State UAW*, 387 Mich at 513.
[122] *Michigan State UAW*, 387 Mich at 514.
[123] *Michigan State UAW*, 387 Mich at 515.
[124] *Michigan State UAW*, 387 Mich at 516-517.

accomplish those purposes to some extent, it was not sufficiently precise or narrowly tailored.[125] Moreover, the Legislature had already passed a "comprehensive set of safeguards to prevent fraudulent voting," and the purpose of the challenged statute could be accomplished pursuant to several other sections of the election code.[126] Thus, a majority of this Court concluded that the State had failed to demonstrate a compelling state interest and that the statute was unconstitutional under art 2, § 1.[127]

This decision should not serve as a basis for finding section 523 unconstitutional under art 2, § 1 for two reasons. First, the Court engaged in no analysis of art 2, § 1 with respect to what the plain language of the provision meant, or the extent to which its language served as a limitation on legislative power. Other than quoting the section itself, the Court offered no interpretation or explanation with respect to how the registration provisions at issue in that case imposed a "qualification" to becoming an elector under art 2, § 1. Second, even if art 2, § 1 is an appropriate vehicle for challenging additional restrictions on voting as opposed to elector qualifications, which the Attorney General argues it is not, the Court's decision in *Michigan State UAW* is distinguishable. Citing federal case law, the *Michigan State UAW* Court automatically applied the compelling state interest test simply because the provisions affected the right to vote. As discussed above, the United States Supreme Court has clarified that not every election law that burdens the right to vote requires strict scrutiny review under the compelling state interest test. Rather, the severity of the burden imposed on the right will determine the level of review. Nevertheless, in *Michigan State UAW* the regulation revoked voters' registrations thus rendering

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[125] *Michigan State UAW*, 387 Mich at 517.
[126] *Michigan State UAW*, 387 Mich at 518-520.
[127] *Michigan State UAW*, 387 Mich at 520. Justices Brennan and Black issued dissenting opinions concluding that the statute was not unconstitutional. Justice Black's dissent was particularly scathing, describing the majority's opinion as purely political. *Michigan State UAW*, 387 Mich at 520.

them unable to vote absent re-registration. Such a burden might well have warranted review under the compelling state interest test after application of the *Burdick* balancing standard, which is essentially what this Court concluded without engaging in that analysis. In this case, however, as demonstrated previously, section 523 does not severely burden the right to vote and thus is not subject to the compelling state interest test. Accordingly, this Court's decision in *Michigan State UAW* is factually and legally distinguishable from the present case, and section 523 passes muster under Const 1963, art 2, § 1.

C. Article 2, § 4 of the Michigan Constitution provides that the Legislature shall enact laws to regulate the time, place, and manner of all elections, and "shall enact laws to preserve the purity of elections," and "to guard against abuses of the elective franchise." Section 523 imposes a time, place, or manner restriction on all electors to produce picture identification before casting a ballot. Section 523 regulates citizens fairly and evenly and does not violate Article 2, § 4.

The Michigan Constitution provides that the Legislature "shall enact laws to regulate the time, place and manner of all nominations and elections," and that "[t]he legislature shall enact laws to preserve the purity of elections," and "to guard against abuses of the elective franchise."[128] The "purity of elections" clause has been interpreted by this Court "to embody two separate concepts: first, that the constitutional authority to enact laws to preserve the purity of elections resides in the Legislature; and second, 'that any law enacted by the Legislature which adversely affects the purity of elections is constitutionally infirm.'"[129] This clause, however, "'is

[128] Const 1963, art 2, § 4. Research has failed to disclose any comparable cases addressing the independent meaning of the "guard against abuses" clause. This Court has made clear, however, that in construing the constitution a provision must be interpreted to give reasonable effect to all, not just some, of its parts. See *House Speaker v Governor*, 443 Mich 560, 579; 506 NW2d 190 (1993). Thus, while cases have focused on the "purity of elections" clause, the "guard against abuses" clause provides the Legislature with a separate and independent basis for enacting section 523.

[129] *Socialist Workers*, 412 Mich at 596, quoting *Wells v Kent County Board of Election Comm'rs*, 382 Mich 112, 123; 168 NW2d 222 (1969).

one of large dimensions. It has no single, precise meaning.'"[130] But "it unmistakably requires . . . fairness and evenhandedness in the election laws of this state."[131] This clause thus acts as both sword and shield – authorizing the Legislature to impose restrictions on voting to protect the process, but prohibiting the Legislature from implementing restrictions that regulate unfairly.

Section 523 is a reasonable time, place, or manner restriction that further serves to preserve the purity of elections and to guard against abuses of the elective franchise by enhancing the integrity of the process and voter confidence, and by protecting against voter fraud.[132] Moreover, the picture identification requirement is fair and evenhanded and does not adversely affect the purity of elections. Again, there is nothing inherently unfair about asking individuals to demonstrate that they are who they profess to be before being allowed to vote. It is also evenhanded because it applies equally to all voters appearing at the polls and offering to vote. Finally, any perceived unfairness in its application to the poor, elderly, handicapped, or others lacking any means of procuring picture identification, dissolves in light of section 523's alternative affidavit provision. This statute is thus distinguishable from the primary regulations found unconstitutional under art 2, § 4 in *Socialist Workers Party*.[133] There, in addition to

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[130] *Socialist Workers Party*, 412 Mich at 595-596, quoting *Wells*, 382 Mich at 123.
[131] *Socialist Workers Party*, 412 Mich at 598. See also *McDonald*, 255 Mich App at 692-696 (holding that straight-ticket ballot option does not violate the "purity of elections" clause.)
[132] Indeed, it is the type of regulation specifically contemplated by the drafters of the Michigan Constitution. The record of the constitutional convention indicates that the convention's purpose in including art 2, § 4, was the following:

> This section accomplishes one of the major objectives of the committee. It vests in the legislature *full authority over election administration*, subject to other provisions of this constitution, and to the national constitution and laws. *The legislature is specifically enjoined to enact corrupt practices legislation.* [2 Official Record, Constitutional Convention 1961, p 2215 (comments of Mr. Pollock) (emphasis added).]

[133] *Socialist Workers Party*, 412 Mich at 596-600.

holding that the regulations violated the federal and state Equal Protection Clauses, this Court concluded that the statutes violated the "purity of elections" clause because they gave an unfair advantage to an established party and its candidates over a "new" political party and its candidates[134]:

> [W]e find that the primary election voting procedure of 1976 PA 94 *imparts a substantial unfair advantage* to political parties entitled to automatic general election ballot placement. Such parties, as distinguished from "new" political parties, need not expend valuable time and resources educating the electorate on how to cast an effective primary vote. The names of the candidates of such parties appear on the primary ballot and the candidates are free to devote all their energies to their respective political messages. We hold, therefore, the election procedure created by 1976 PA 94 is inconsistent with the goal of "equality of treatment" of parties and their candidates seeking access to the general election ballot in violation of the "purity of elections" clause, Const 1963, art 2, § 4.

Again, section 523 treats all persons equally because it applies to all electors. To the extent that it can be considered as "unfairly" affecting a class of individuals, such as the elderly, handicapped, or indigent, any such "unfairness" is not substantial in light of the minimally burdensome affidavit provision. This Court should therefore conclude that section 523 does not violate art 2, § 4 of the Michigan Constitution.

[134] *Socialist Workers Party*, 412 Mich at 600 (emphasis added).

D. The Twenty-Fourth Amendment of the United States Constitution prohibits the payment of any poll or tax for the right to vote in federal elections. The Equal Protection Clause similarly prohibits making wealth or affluence a condition of voting in State elections. In obtaining identification sufficient to satisfy section 523's picture identification requirement, some citizens may incur fees or costs as a result of that process. The incidental costs associated with procuring picture identification do not constitute an impermissible poll tax or impose wealth or affluence as a condition upon voting in violation of the Twenty-Fourth Amendment or the Equal Protection Clause.

The Twenty-Fourth Amendment to the US Constitution provides that, "[t]he right of citizens of the United States to vote . . . shall not be denied or abridged by . . . any State by reason of failure to pay any poll or other tax."[135] Upon the adoption of this Amendment, no State could condition the right to vote in a federal election upon the payment of a poll tax.[136] "[T]he Twenty-fourth Amendment does not merely insure that the franchise shall not be 'denied' by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be 'denied or abridged' for that reason."[137] With respect to state elections, the United States Supreme Court in *Harper v Virginia Board of Elections*, overruled prior precedent and concluded that a "State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[138] In striking down the State of Virginia's $1.50 poll tax for State elections, the Court observed[139]:

> Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race (*Korematsu v United State*s, 323 US 214, 216), are traditionally disfavored. See *Edwards v California*, 314 US 160, 184-185

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[135] US Const, Am XXIV. This amendment was proposed by the Eighty-Seventh Congress by Senate Joint Resolution No 29, which was approved by the Senate on March 27, 1962, and by the House of Representatives on August 27, 1962. It was ratified by Michigan on February 20, 1963.
[136] *Harman v Forssenius*, 380 US 528, 540; 85 S Ct 1177; 14 L Ed 2d 50 (1965).
[137] *Harman*, 380 US at 540.
[138] *Harper v Virginia Board of Elections*, 383 US 663; 86 S Ct 1079; 16 L Ed 2d 169 (1966).
[139] *Harper*, 383 US at 668-669 (emphasis added).

> (Jackson, J., concurring); *Griffin v Illinois*, 351 US 12; *Douglas v California*, 372 US 353. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. *In this context -- that is, as a condition of obtaining a ballot -- the requirement of fee paying causes an "invidious" discrimination* (*Skinner v Oklahoma*, 316 US 535, 541) that runs afoul of the Equal Protection Clause. Levy "by the poll," as stated in *Breedlove v Suttles*, [302 US 277, 281(1937)], is an old familiar form of taxation; and *we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise*. *Breedlove v Suttles* sanctioned its use as "a prerequisite of voting." *Id*., at 283. To that extent the *Breedlove* case is overruled.

Thus, under the Twenty-Fourth Amendment and the Supreme Court's decision in *Harper*, a State cannot "condition" the right to vote upon the payment of a fee in either federal or state elections.

In this case, section 523 clearly is not an unconstitutional poll tax under the plain language of *Harper* because it does not "condition" the right to vote upon the payment of a fee.[140] Nor does it abridge the right to vote by imposing "a material requirement solely upon those who refuse to surrender their constitutional right to vote . . . without paying a poll tax."[141] In other words, there is no quid pro quo element present in section 523; a voter is not forced to choose between paying or voting, or choosing between paying or complying with a punitive measure in order to vote. For the few who do not possess acceptable picture identification and are not eligible for a free identification card, the enforcement of section 523 will impose an incidental cost associated with procuring identification only if the voter declines to sign an affidavit as set forth in the section. Thus, even if the indirect or incidental costs associated with procuring picture identification could be considered akin to a poll tax, which they are not, the

[140] See also *Johnson v Governor of Florida*, 405 F3d 1214, 1217 (CA 11, 2005) ("The plaintiffs also allege that Florida's voting rights restoration scheme violates constitutional and statutory prohibitions against poll taxes. . . . Under Florida's Rules of Executive Clemency, however, the right to vote can still be granted to felons who cannot afford to pay restitution. . . . Because Florida does not deny access to the restoration of the franchise based on ability to pay," summary judgment was appropriate.)

[141] *Harman*, 380 US at 541.

existence of the minimally burdensome affidavit option negates any question of unconstitutionality.

An argument was raised by the plaintiffs in *Indiana Democratic Party v Rokita*, discussed above, that incidental costs for time, travel, birth certificate fees, etc, incurred in the process of obtaining picture identification constituted a poll tax.[142] The district court disagreed, observing that "[t]his argument represents a dramatic overstatement of what fairly constitutes a poll tax," and that[143]:

> It is axiomatic that "(e)lection laws will invariably impose some burden upon individual voters," *Burdick v* [*Takushi*], 504 US 428, 433 (1992). Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because these same "costs" also result from voter registration and in-person voting requirements, which one would not reasonably construe as a poll tax. Plaintiffs provide no principled argument in support of this poll tax theory.

The same argument – with a diametrically opposed result – was raised in the *Billups* decision. There, the plaintiffs argued that the $20 or $35 fee for a state identification card was a poll tax because voters who did not have other acceptable forms of identification were required to obtain the state identification cards to cast their votes in person at the polls.[144] The district court essentially concluded that voters who did not already have acceptable identification would be forced to procure the state identification cards and pay the fee and costs associated with procuring the cards. The court dismissed the fact that all voters could vote absentee without picture identification, noting that voters might be unaware of that fact or unable to navigate the absentee ballot process. The court further dismissed the fact that voters could obtain a free card

[142] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *136-137.
[143] *Indiana Democratic Party*, 2006 US Dist LEXIS 20321 at *137.
[144] *Billups*, 406 F Supp 2d at 1366-1367.

by filling out a fee waiver affidavit, noting that voters might not be aware of this option, or may be reluctant or too embarrassed to affirm that they cannot pay or are indigent.[145]

The district court concluded that even if the fee waiver affidavit was a realistic option for voters, it still violated the Twenty-Fourth Amendment[146]:

> As the Supreme Court noted in *Harman* [*v Forssenius*], any material requirement imposed upon a voter solely because of the voter's refusal to pay a poll tax violates the Twenty-fourth Amendment. *Harman*, 380 US at 542. A voter who does not have another acceptable form of Photo ID and who wishes to vote must, as a practical matter, obtain a Photo ID card. To obtain a Photo ID card, the voter must arrange for transportation to a DDS service center or the GLOW bus, if that option is available, and must navigate the lengthy waiting process successfully. The voter then must pay the $ 20 fee or sign the fee waiver affidavit, which may require the voter to swear or affirm to facts that simply are not true in order to avoid paying the $ 20 fee. Under those circumstances, the Court cannot determine that the fee waiver affidavit is not a material requirement, as discussed in *Harman*. Consequently, the Court finds that the Photo ID requirement imposes a poll tax.

The district court also concluded that Georgia's requirement violated the Equal Protection Clause under *Harper* with respect to State and municipal elections.

The Georgia court's analysis is simply wrong. Neither *Harper* nor *Harman* support the expansion of what is an impermissible "poll tax" or qualification based on affluence to incidental costs associated with participating in the electoral process. Again, the *Harper* Court concluded it was unconstitutional to use affluence as a "condition to obtaining a ballot" or as "a condition to the exercise of the franchise."[147] The incidental costs associated with procuring identification cards under Georgia's or Michigan's identification requirements do not "condition" the right to vote on the payment of a fee. The regulations are not analogous to the quid pro quo situation the *Harper* Court addressed. In the context of the Twenty-Fourth Amendment, the *Harman* Court concluded that Virginia could not force electors in state elections to choose between paying a fee

[145] *Billups*, 406 F Supp 2d at 1368-1370.
[146] *Billups*, 406 F Supp 2d at 1370.
[147] *Harper*, 383 US at 668-669.

for the right to vote or executing an affidavit of residency in order to vote because "the [affidavit] requirement imposed upon the voter who refuses to pay the poll tax constitutes an abridgment of his right to vote by reason of failure to pay the poll tax."[148] In other words, a State cannot affirmatively impose a fee to vote, or unduly burden an elector's right to vote for failure to pay a fee, because doing so in effect still "conditions" the right to vote upon the possession or expenditure of wealth. The incidental costs associated with section 523 – in the event an elector decides to incur such costs rather than use an alternatively acceptable form of identification or utilize the affidavit provision – is one level removed from this situation. An elector will pay a fee or incur costs for the right to obtain an identification card, not the right to vote. Neither *Harper* nor *Harman* support such an extension of the "poll tax" analysis.

Section 523 therefore does not impose an unconstitutional poll tax under the Twenty-Fourth Amendment, or make wealth or affluence a qualification for voting in violation of the Equal Protection Clause.

[148] *Harman*, 380 US at 541-542.

CONCLUSION AND RELIEF SOUGHT

Therefore, for all the reasons stated above, the Attorney General urges this Court to rule that the photo identification requirements of section 523 of 2005 PA 71, MCL 168.523, on their face, do not violate either the United States Constitution or the Michigan Constitution.

Respectfully submitted,

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